IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23433, 23180, 23879, 23754, 23730, 23895, 24353, 24826 to 24829 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RADHA TEJPAL BAJAJ - Petitioner(s)
Versus
PRESIDENT - INDUSTRIAL COURT & 1 - Respondent(s)

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Appearance :
MS HINA DESAI for Petitioner

MR AS SUPEHIA FOR PETITIONER
Mr LB DABHI for Respondent(s) : 1,
MR JB PARDIWALA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 21/12/2006

ORAL JUDGMENT

1. Heard the learned advocate, Mr.A.S.Supehia, and learned advocate, Ms.Hina Desai, appearing on

behalf of petitioners.

2. Rule. Learned AGP, Mr.Dabhi, waives the service of rule on behalf of respondent No.1 and learned advocate Mr.Pardiwala, waives the service of rule on behalf of respondent No.2.

3. In this group of petitions, the Administrative Head, In-charge President of Industrial Court has committed an error which found apparently on the face of record ignoring the decision of this Court and accepting the administrative instruction of the State Government (Local Fund Office). The higher grade benefits given to each petitioner by the respondents which subsequently found to be erroneous and that mistake has been rectified and finally, it has been concluded by the President of Industrial Court by an order dated 21.6.2002 and 26.6.2002, a decision was taken relying upon Rule 57A(i)(ii) of the BCSR to waive the recovery of excess payment made to the petitioners. The President of Industrial Court has passed an order

waiving the recovery of the excess amount which has been paid to the petitioner vide amendment dated 21.6.2002 and 26.6.2002. Therefore, it was decided by the President of Industrial Court that due to the erroneous fixation, whatever amount excess has been paid to the petitioners, should not have to be recovered by the department from each petitioner. However, because the Local Audit Fund Office has raised objection at Vadodara and Ahmedabad for fixation of their pay, the said office objected against such waiver of the recovery vide No.5 as mentioned in order on the ground that recovery can be waived under BCSR 57A(i)(ii) or GCSR 28(1)(2) only if the promotion was wrongfully given to the employee concerned but, those rules have not application where the 9 years' higher pay scale was wrongfully granted to an employee. The reason behind the objection of the Local Audit Fund Office, according to President of the Industrial Court, is that while in case of wrongful promotion, employee concerned had actually worked on the promotional post, whereas in case of 9 years higher pay scale the

employee concerned hnd not worked on the promotional post but, by virtue of the GR of Finance Department dated 16.8.1994, merely because they had worked for 9 years in a cadre for getting promotion, they were granted the higher pay scale and since the higher pay scale was granted wrongfully, the recovery of excess payment has to be made. In light of this background, the President of Industrial Court issued show cause notice to the petitioners as to why the amendment dated 21.6.2002 and 26.6.2002 vide No.4 waiving the recovery of excess payment should not be cancelled. Meaning thereby that petitioners were called upon the show cause as to why the recovery should not be effected in terms of original orders dated 16.10.2001, 7.5.2002 and 16.5.2002. Ultimately, after the representation of the petitioners, the Incharge President has come to the conclusion by an order dated 13.10.2006 issuing the recovery order from the salary of the petitioners. But, before that, he made certain observations which are relevant, therefore, same are quoted as under :

> “So far as the decision of the Hon'ble High Court are concerned, there is a constant trained that if the excess payment is paid to the concerned employees and there is no error, misrepresentation, fraud, misdeed or the like on the part of the employee concerned, the recovery of the excess payment cannot be effected and if I was to decide this question finally, I may have hold that the recovery cannot effected.”

4. Learned advocate, Mr.Supehia and learned Advocate, Ms.Hina Desai, relied upon the order passed by this Court in SCA No.6006 to 6008 of 2002 dated 28.1.2003 wherein identical question has been decided by this Court where after a period of four years, decision has been taken to cancel earlier decision and consequence thereof, recovery is sought to be effected. Therefore, this Court in respect to higher pay scale, set aside the recovery and petitions are allowed by this Court. This order was challenged by the

Secretary, Finance Department before the Division Bench of this Court in LPA No.750 of 2003 where the Division Bench of this Court on 16.12.2004 dismissed the said LPA. Against which, SLP (Civil) No.6775 to 6777 of 2005 on 25.7.2005 which was also dismissed by the Supreme Court. Meaning thereby that decision given by learned Single Judge in SCA No.6006 to 6008 of 2002 is confirmed upto the Apex Court and, therefore, Para.7 and 8 are relevant from order of SCA No.6006 to 6008 of 2002 dated 28.1.2003, therefore, quoted as under :

> “7. In view of the above, what is required to be noted is that there is no dispute on the point that pursuant to the decision of the higher authority the payscale in the higher grade was granted to the petitioner and after a period of about more than 4 years the decision is taken of cancelling the earlier decision and as a consequence thereof recovery is sought to be effected. It is not the case of the respondents that the higher payscale came to be granted on account of fraud or misrepresentation or any misdeed which can be attributedto the concerned employee. Therefore, it appears that it is on account of subsequent change of decision by the authority without attributing anything to the concerned employee the decision is cancelled and the recovery is sought to be effected. Therefore, under the circumstances, it will have to be examined as to whether such an act on the part of respondents is permitted under law or not.
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> 8. In case of I.C.Patel (supra) the division bench of this court observed as under:

> "The mistake was committed by the Board for which the appellant should not be penalised. Recovery of excess payment made to the appellant for no fault on his part appears to be wholly unjustified."

In case of P.H.Reddy (supra) the Apex Court also found that the order of fixation passed by the appropriate authority does not require any interference. Still however, the Apex Court observed as under:

> "The employees-appellant, who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of the order of the authority is set aside."

5. Learned advocate, Mr.Supehia, also relied upon the decision of this Court in SCA No.11587 of 2006 dated 14.6.2006 wherein the benefit of higher grade which has been granted in favour of employee is also covered under Rule 57A of the BCSR Rules,1959.

6. In view of these facts, the question is that whether President who has initially passed an order waiving the recovery of an excess amount vide amendment dated 21.6.2002 and 26.6.2002 at No.4 is entitled or competent to review his own order as an administrative authority who is not higher authority and therefore incarhge President who is the same authority decided earlier not to recover the excess amount from the petitioners.

Thereafter, same authority has come to the different conclusion as an administrative authority which amounts to reviewing the earlier order. For that, President of Industrial Court is not authorized under the Service Rules to review his own order. Therefore, the order dated 13.10.2006 directing recovery of an excess payment from the salary of the petitioners is bad and without jurisdiction. However, this aspect has been considered by this Court in SCA No.15171 of 2005 dated 18.12.2006 wherein identical question has been examined by this Court that recovery is not permissible when mistake committed by the department and there was no misrepresentation made by the employee concerned as in Para.9, 10, 11, 12, 13, 14, 15 and 16 which are quoted as under :

> "9. The Apex Court has observed the issued involved in case of ***Sahib Ram v. State of Haryana and Others*** reported in ***1995 AIR SCW 1780***. The relevant Head Note is as under :
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> *"Constitution of India, Art. 311 – Pay scale*

– Revision of – Govt. in consultation with University Grants Commission revising pay scales of Libraries in Govt. Colleges but insisting upon minimum educational qualifications – Relaxation of qualifications only as regards obtaining 1st/IInd class in prescribed qualification but not in educational qualifications itself – Appellant-Librarian not possessing required qualifications – Would not be entitled to relaxation – However, benefit of higher pay-scale given to appellant not on account of any misrepresentation made by appellant but by wrong construction made by Principal – Amount paid not ordered to be recovered under circumstances.

Wages – Higher pay scale wrongly given – No fault of employee – Recovery not made."

10. The Calcutta High Court has also observed in case of ***Kalyan Kumar Chattopadhyay v. State of West Bengal & Ors.,*** reported in ***2006 III CLR 131.*** The Head Note is relevant which is quoted as under :

"Constitution of India, 1950 – Arts. 14, 21, 226 – Retiral Benefits – Petitioner-Assistant Teacher retired on 31st January 2003 – Denied his retiral benefits despite repeated requests and demands – Hence this petition – Held that it was erroneous fixation of pay

scale of the petitioner by officer concerned – No fault on the part of petitioner – Not advisable to recover such excess payments after retirement of the employee – It cannot be adjusted against retiral dues – Legally enforceable right of petitioner to stop such type of recovery – Mandamus can be enforced."

11. The Calcutta High Court has also observed in case of ***Union of India through Secy., Ministry of Health and Family Welfare & Ors. v. Jangam Anant Amrutling*** reported in ***2006 III CLR 463.*** The Head Note is relevant which is quoted as under :

"Pay Fixation – Correction therein – Recovery of excess amount paid – Respondent was Laboratory Technician regularised w.e.f. 28.9.1984 in the pay-scale of Rs.380-560 – In pursuance of 4th Pay Commission recommendation, his pay was fixed in pay-scale of Rs.1400-2300 – In fact it should have been fixed in pay-scale of Rs.1320-2040 – Mistake came to light in 1999 – It was corrected after show cause notice and recovery of excess payment was sought to be made – Respondent therefore approached Central Administrative Tribunal who directed petitioner not to effect recovery of excess amount paid – Hence this petition – While dismissing this petition and confirming order

of Tribunal, the decision of the Supreme Court in the case of Shyam Babu Verma v. Union of India 1994(2) SCC 521 is followed and it is held that Tribunal has not committed any error of law or jurisdiction in directing the petitioner not to recover excess amount from the respondent. It is an admitted position that the pay-scale of the respondent was sought to be rectified almost after a lapse of 11 years. Further, it is also admitted that the error was committed by the petitioners and the respondent was not in any way responsible. It is not the case of the petitioners that the error was on account of wrong representation made by the respondent."

12. The Madras High Court has also held in case of ***D. Palavesamuthu v. Tamil Nadu Administrative Tribunal, represented by its Registrar, Chennai and others*** reported in ***(2006) 1 MLJ 143***. The Head Note is relevant which is quoted as under :

"Service Law – Petitioner promoted as Elementary School Headmaster – But paid salary of Special Grade Headmaster – Objections raised by the Accountant-General while scrutinizing pension papers – Tribunal upholding the objections of the Accountant-General – Held – Fault committed by the

department and their officers and its petitioner cannot be penalised after lapse of number of years that too after retirement."

13. The High Court of Madras has also observed the said question in case of ***S. Ganapathy v. Commissioner of Commercial Taxes, Chennai and Another*** reported in ***(2006) 3 M.L.J. 532***. The relevant Para 15 and 16 are quoted as under :

"15. The law is well settled in this aspect. Normally when an official has been conferred with the benefit of promotion as well as with the pay scale and the same has been enjoyed for a considerable period, it is not open to the authority later to decide against him, on the basis that a mistake has been committed by giving promotion or pay fixation. That was decided by the Division Bench of this Court in D. Palavesamuthu v. Tamil Nadu Administrative Tribunal represented by its Registrar, Chennai and others 2006(1) MLJ 143. The Hon'ble Division Bench of this Court while placing reliance on the judgment of the Apex Court in Sahib Ram v. State of Haryana AIR 1995 SCW 1780 : 1995 Supp(1) SCC 18 has laid down the distum as follows :

"Even if it is accepted for argument

sake that salary of the petitioner is fixed in a wrong scale of pay, it is the fault committed by the Department and their Officers, for which the petitioner should not be penalised after a lapse of number of years that too after retirement of the petitioner."

16. Since the judgment of the Division Bench was based on the judgment of the Hon'ble Supreme Court, I feel it is relevant to extract the dictum laid down by the Supreme Court in Sahib Ram's case (supra). The Hon'ble Supreme Court has declared the law as follows :

"..... It is not on account of any misrepresentation made by the appellant that the benefit of higher pay-scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to at fault. Under these circumstances, the amount paid till date may not be recovered from the appellant..."

14. The Madurai Bench of Madras High Court has also observed in case of ***P. Arumugam v. Registrar, Tamil University, Thanjavur*** reported in ***(2006) 3 M.L.J. 1025***. The relevant Para 11.5 is quoted as under :

"11.5 In the above stated circumstances,

the question that remains to be considered is as to whether the respondent can be permitted to re-work the fixation of pay and the excess payment, if any, paid to the appellant based on wrong fixation of pay right from 1.2.1984 and seek for recovery of a huge sum of Rs.3,95,093/- from the terminal benefits payable to the appellant. It is relevant to state that between 1.2.1984 i.e. the date of appointment of the appellant as Superintendent in the respondent University, till he was allowed to retire from service on 31.12.2001, the respondent did not raise its little finger as regards the alleged excess payment paid to the appellant. On the other hand, knowing fully well about the previous employment of the appellant, the respondent University in its offer of appointment, dated 13.6.1983 as well as the order of appointment dated 21.7.1983, specifically mentioned that the pay of the appellant was being fixed in a particular scale ensuring the pay last drawn by the appellant in his previous employment. That part, it is not known why inspite of the Audit Objections raised as early as in the year 1984-85, the respondent did not intimate the same to the appellant nor taken any proceedings for suitably re-fixing the pay fixed at the time of issuance of the order of appointment in accordance with Rule 44(4)(i) of the Tamil Nadu Pension Rules. The

respondent thus, with its eyes wide open, fixed the pay of the appellant in a particular scale of pay applicable to him and also allowed him to draw that pay throughout his service in the respondent University till the date of his retirement. Therefore, while the respondent was squarely responsible for the wrong fixation of pay, if any, of the appellant, the appellant was never to be blamed as regards his pay fixation. Neither in the offer of appointment nor in the appointment order, the appellant was ever reminded about any intimation required as regards the receipt of pension in the erstwhile service rendered by him in the State Government."

15. The Apex Court has observed in case of ***Shri Shekhar Ghosh v. Union of India & Anr.*** Reported in ***2006(11) SCALE 363***. The relevant Head Note is quoted as under :

"SERVICE – REPATRIATION – Rectification of mistake in service records – Principles of natural justice required to be complied with – A post decisional hearing in such a case not contemplated in law – Appellant was appointed as Khalasi in Railways in year 1981 – He was promoted as a Junior Clerk and transferred in one Railway Electrification Project – While working there as a Junior

Clerk, he was promoted as a Senior Clerk in year 1987 on an ad hoc basis – On completion of the project, he was repatriated to his original office – A complaint made against appellant by four employees that he was not entitled thereto alleging that promotion granted to him was not a regular one – By an order dated 18.10.1996, he was repatriated to his original place of work – Respondents proceeded on basis that a mistake occurred in making an entry in the service book of appellant – No Inquiry held to arrive at a finding that appellant was guilty of charges levelled against him – Hearing sought to be given was post-decisional one – Copy of complaint not supplied to appellant – It is also not a case where a mistake was apparent on face of records – Whether appellant was entitled to a right of hearing – Held, Yes – Whether High Court was justified in holding that petitioner was rightly repatriated back to the workshop on the post of Khalasi – Allowing the appeal, Held.“

In MM Patel V/s. State of Gujarat, {2003) 1 GHJ (668) and Ganesha Basti Bathinda v. State of Punjab and others, 2003 Lab. IC 1029, question of recovery on account of wrong fixation of salary was aarising which was sought to be effected without complying with the principles of natural justice. It was held to be improper. It was

also held that the recovery cannot be made on the ground of wrong fixation of pay.

16.In Purshottam Lal Das & Others versus State of Bihar & Others, reported in 2006 (10) SCALE 89, the apex court has, after considering the question of recovery of amounts paid when employees worked in the promotional posts. In para 7 of the said judgment, the apex court observed as under:

> “7. So far as the recovery is concerned, in a normal course if the promotion/appointment is void ab initio, a mere fact that the employee had worked in the concerned post for long cannot be a ground for not directing recovery. The cases relied upon by the learned counsel for the State were rendered in different backdrop. In hose cases, the appellants were guilty of producing forged certificates or the appointments had been secured on non permissible grounds. In that back ground, this Court held that recovery is 0permissible. On the contrary, the fact situation of the present case bears some similarity to the cases in Sahib Ram v. State of Haryana (1995 Supp. (1) SCC 18), Bihar State Electricity Board and Anr. v. Bijay

Bhadur and Anr. (2000 (10) SCC 99) and State of Karnataka and Anr. v. Mangalore University Non teaching Employees' Association and Ors. (2002 (3) SCC 302).“

6.2 Recently, the Apex Court has considered this aspect in the case of Union of India & Ors. vs. Bikash Kuanar reported in 2006 (111) FLR 707. Relevant observations is quoted as under :

“The Division Bench after hearing the counsel for the parties observed that the power of review is conferred by the statute. In case of an appointment made under the Rules framed for the purpose of appointment, such appointment could not be cancelled either by the same authority or higher authorities in exercise of power of administrative exigency.

The High Court in the impugned judgment also stated that the civil rights had already accrued to the respondent who rendered one and a half years of service. Once such civil rights had accrued, the authorities exercising their executive power cannot review the appointment.

> The Division Bench held that the administrative instructions have no statutory force, therefore, these cannot be enforced and following such instructions, the respondent's appointment could not be legally cancelled.
>
> The respondent be given an opportunity to resume his duties within 30 days from the date of its roder.
>
> The Division Bench of the High Court, in our considered view, correctly applied the law, which has been crystallized in a number of decisions of this Court."

7. In view of the aforesaid decision of Apex Court and various High Courts, the question which has been raised in the present petitions that whether department is entitled to recover excess payment which has been paid to the petitioners on the basis of wrong fixation or erroneous fixation made by the department. It is undisputed facts and there is no allegation made against the petitioners that petitioners have made misrepresentation or committed fraud or make incorrect statement to get the benefit from the

department. Therefore, when department has committed mistake while giving the benefit in favour of petitioners and after number of years, such mistake when brought to the notice of department which was correct subsequently, then, whatever the excess amount which has been paid to the petitioners by the department shall not be recovered from the petitioners and such recovery is ab-initio void as held by apex Court, as referred above.

8. In the result, the order dated 13.10.2006 passed by In-charge President, Industrial Court is required to be quashed and set aside. Accordingly, present petitions are allowed. The order dated 13.10.2006 passed by Incharge President, Industrial Court is hereby quashed and set aside. Rule is made absolute to the aforesaid extent.

(H.K.RATHOD,J.)

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